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COMMISSION ON THE STATUS OF WOMEN
Open-ended Working Group on the
Elaboration of a Draft Optional
Protocol to the Convention on the
Elimination of All Forms of
Discrimination against Women
11-22 March 1996

ELABORATION OF A DRAFT OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Draft report of the Open-ended Working Group (Part I)*

Chairperson: Ms. Aloisia WÖRGETTER (Austria)

INTRODUCTION

1. The Open-ended Working Group on the Elaboration of a Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women was convened pursuant to Economic and Social Council resolution 1995/29 of 24 July 1995 to consider a comprehensive report by the Secretary-General, including a synthesis, on the views of Governments, intergovernmental organizations and non-governmental organizations on an optional protocol to the Convention, including views related to feasibility, taking into account the elements suggested by the Committee on the Elimination of Discrimination against Women in its suggestion 7, adopted at its fourteenth session. 1/

2. At the 4th plenary meeting, on 12 March 1996, the Vice-Chairperson of the Commission, Ms. Karin Stoltenberg (Norway) was designated Chairperson of the Working Group. At the 7th plenary meeting, Ms. Aloisia Wörgetter (Austria) was designated Chairperson of the Working Group to replace Ms. Karin Stoltenberg (Norway) who resigned due to unforeseen circumstances.

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* The draft report of the Open-ended Working Group will be issued in two parts under the symbol E/CN.6/1996/WG/L.1 and Add.1.

3. The Working Group met from 11 to 22 March 1996. It held ____ meetings (1 to __). It had before it a report of the Secretary-General on the elaboration of a draft protocol to the Convention on the Elimination of All Forms of Discrimination against Women contained in documents E/CN.6/1996/10 and Corr.1 and Add.1 and 2.

4. The acting-Chairperson opened the meeting and made a statement.

5. The Director of the Division for the Advancement of Women made an introductory statement.

6. At the same meeting, in order to assist in its deliberations, the Working Group was briefed by a member of the Committee on Human Rights on the provisions, procedures and experience of the Committee on Human Rights under the First Optional Protocol to the International Covenant on Civil and Political Rights. He also responded to questions raised by delegations.

7. At the 2nd and 5th meetings, on 12 and 13 March, the Chairperson of the Committee on the Elimination of Discrimination against Women made a statement and responded to questions raised by delegations with regard to specific elements of suggestion 7, as well as with regard to the working methods of the Committee in the examination of States parties' reports.

8. At the 5th meeting, on 13 March, the representative of the Centre for Human Rights responded to questions raised by delegations with regard to the practice and procedures of other United Nations human rights mechanisms.

9. The Working Group, at the invitation of the Chairperson, first held a general exchange of views on the question of an optional protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, followed by a systematic and in-depth exchange of views on aspects that would need to be addressed in such a protocol, using as a basis for discussion the elements proposed by the Committee on the Elimination of Discrimination against Women in suggestion 7.

A. General exchange of views

10. There was strong support in favour of an optional protocol to the Convention and the process initiated for its elaboration. Delegations stated their readiness to cooperate and to participate actively in the Working Group to achieve an effective instrument that would command the greatest possible support and a large number of ratifications.

11. Delegations identified certain difficulties to be overcome in the elaboration of a protocol, raised questions that needed to be clarified in the process, and expressed support for its preparation at this point in time.

12. It was argued that an optional protocol would increase the efficacy of the Convention, and lead to more effective protection and promotion of the human rights of women. Such a procedure would strengthen the Convention and put it on an equal footing with other human rights treaty mechanisms. According to one

delegation, a communications procedure could place undue attention on individual cases, whereas situations of massive violations needed to be addressed.

13. The preparation of an optional protocol was seen to be a key element in the follow-up to the Vienna Conference on Human Rights and the Fourth World Conference on Women. It represented a unique opportunity to fill procedural gaps in existing mechanisms. During its preparation, the reasons for the low number of ratifications of other complaints mechanisms could be assessed with a view to avoiding them in the instrument.

14. Many delegations pointed out that the question of the relationship between the proposed optional protocol and existing mechanisms providing for a communications procedure needed careful consideration. In that regard, overlapping or duplication would have to be avoided; the need for streamlining of the human rights machinery was noted, including the efforts to mainstream women's human rights and a gender perspective into the general human rights regime. It was also emphasized that, while the question of overlapping and duplication presented a challenge, it should not stand in the way of the elaboration of such a procedure. The question of overlapping had also been raised, inter alia, at the time of the drafting of a Convention on the Elimination of All Forms of Discrimination against Women, and its reporting procedure, both of which are now widely accepted.

15. The possible complementary role that a well-drafted protocol could play within the human rights regime was highlighted, especially given the wider scope of the provisions of the Convention. The limitations of other procedures, and their lack of concern for the rights of women were noted. The elements proposed by the Committee on the Elimination of Discrimination against Women and those contained in the Maastricht draft would be useful in the work ahead.

16. Reference was made to procedures under a number of treaty-based and Charter-based human rights mechanisms. It was noted that the different nature of the communications procedure under the Commission on the Status of Women would not overlap with an optional protocol. The view was expressed that an optional protocol should not establish an essentially different approach from the one contained in the First Optional Protocol under the International Covenant on Civil and Political Rights. However, further comparison with the mandates and jurisprudence of existing machinery would help to identify where further work was needed to support the realization of women's rights.

17. The question of the justiciability of rights contained in the Convention on the Elimination of All Forms of Discrimination against Women under an optional protocol on the right to petition was addressed by many delegations. Several delegates pointed to the diverse nature of States parties' obligations under the various provisions of the Convention, and the implications for their justiciability. It was suggested that some provisions would be clearly suited to be the subject of a petition procedure, while other provisions were of a more programmatic nature for which a different procedure might be required. Thus, work on an optional protocol would need to proceed in the light of the various types of provisions contained in the Convention. On the other hand, a number of delegates expressed the view that all substantive provisions of the Convention should be considered justiciable under an optional protocol.

18. Several delegations commended the important work done by the Committee on the Elimination of Discrimination against Women. The need to strengthen the Committee through, inter alia, an increase in resources and meeting time was put forward. Concern was expressed by some delegations that despite the recent extension of meeting time for the Committee, this might not be sufficient to deal both with the existing backlog in report consideration, as well as with the task of considering communications.

19. Some delegates expressed concern with regard to possible financial implications resulting from the adoption of an optional protocol. The costs involved would need to be estimated. One delegate expressed the view that the elaboration of an optional protocol might not be the best use of resources for maximizing the effectiveness of women's enjoyment of their rights. Instead, the achievement of universal ratification and better implementation of the Convention should be pursued, including through better and more timely reporting to the Committee.

B. In-depth consideration of major aspects to be covered by an optional protocol, following the elements contained in Committee suggestion 7

20. The Chairperson invited the Working Group, in addressing the specific elements proposed by the Committee on the Elimination of Discrimination against Women, to take into consideration the cross-cutting themes that had emerged during the general exchange of views, such as the question of overlapping with existing procedures, and the question of justiciability, as applicable. She informed the Working Group of her intention to call also on non-governmental organizations to make their comments on specific elements.

Element 5

21. Delegations considered the element to be acceptable. It was proposed to add the option of signing it, i.e. "... option to sign, ratify or accede to it".

22. The question of the status and impact of reservations entered to provisions of the Convention by States parties with regard to the admissibility of communications under the optional protocol was discussed. Delegations agreed that ratification of the optional protocol would leave substantive reservations to the Convention intact. Some delegations considered such an understanding to be without prejudice to the permissibility of a reservation and its compatibility with the Convention and with international treaty law. While agreeing that reservations were permissible under the Convention, reference was also made to article 28.2 that "a reservation incompatible with the object and purpose of the Convention shall not be permitted". Thus, one delegation could not share the view expressed by many that a reservation to a substantive provision would a priori prevent the Committee from considering a communication. A particular case in point would be reservations of a sweeping nature to which certain States parties have stated their objections. It would be up to the Committee to examine the compatibility of such reservations with the Convention, and, consequently, the admissibility of a communication.

23. With regard to justiciability, it was suggested that this question would be especially relevant with regard to discussions on the type of procedure to be contained in an optional protocol, and its relation to the various provisions of the Convention, including whether the programmatic provisions would be excluded from being justiciable under an individual complaints procedure. The view was expressed that only those provisions of the Convention that established absolute obligations could be justiciable. The type of views the Committee would express at the conclusion of an examination would also be relevant in this regard.

24. Some delegations stated that it should be left to the Committee to determine the question of justiciability on the basis of concrete cases, rather than to exclude a priori certain provisions.

25. One delegation pointed out that the question of justiciability was not limited to the Women's Convention. It was also relevant to, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, yet in that case, the complaints procedure of article 14 covered the Convention as a whole. In considering it, the importance of the implementation of treaties in good faith and according to the principle of pacta sunt servanda was stressed. Some stated that, while some provisions of the Convention had direct effects and could, as well as should, be implemented immediately, including the non-discrimination provision, other provisions might have to be implemented progressively. The guiding legal principle, however, should be that States parties are under an obligation to take steps towards achieving the goals, an obligation for which they could be held accountable.

Element 6

26. At the recommendation of the Chairperson, no in-depth discussion of element 6 took place, as subsequent elements address the various aspects of a communications (elements 7-16) and of an inquiry (element 17-24) procedure.

27. While some delegations proposed the retention of only the communications procedure, others noted the need for both, a communications and an inquiry procedure.

28. The view was stated that the purpose of the optional protocol would determine whether only one, or both procedures, would be needed. The examination of individual complaints, in an approach similar to other existing individual complaints procedures, was identified by one delegation as the principal purpose of an optional protocol. Only justiciable provisions would fall under the individual complaints procedure, whereas violations of a more general nature of provisions of the Convention could be addressed, for example, in the framework of the reporting procedure.

Element 7

29. With respect to this element, the question of who should have standing to submit a communication was discussed, and whether this should be extended to a person or group having sufficient interest in the matter.

30. A number of delegations were of the view that individuals as well as groups should have standing, along the lines of the Committee on the Elimination of Racial Discrimination, as well as of some regional procedures. Standing for groups would be needed in cases of major violations. The language could be specified to read: "groups or organizations with specific interest in women". It was proposed that "groups" could be more specific, such as "groups of persons", or "groups of individuals", or "groups acting on behalf of individuals". Other delegations referred to the example of the First Optional Protocol under the International Covenant on Civil and Political Rights, which grants standing to individuals only. One delegation stated that only victims themselves should have standing.

31. One delegation, pointing to the quasi-judicial nature of the procedure, did not favour an approach that would allow groups of victims to file complaints. The comparison to national judicial processes was made which also did not allow such group complaints. At the same time, the important role of organizations in assisting victims in filing complaints was stressed. The distinction between the victim having the right to complain, and the person, group, or representative who may file a complaint on the person's behalf, would need to be made clear. In this view, other procedures, such as the communications procedure of the Commission on the Status of Women, were considered to be more appropriate for widespread or systematic violations.

32. Many delegations stated that the term "organization" needed clarification. Any difference to "groups" would need to be elaborated. If "organization" meant "non-governmental organizations", then it should be so stated, in which case it might be merged with "groups". At the same time, a requirement to have groups file on behalf of their members was also proposed. One delegation cautioned against broadening the categories of persons who might submit complaints, as the Committee might be flooded with communications, and noted possible financial implications. On the other hand it was stated that allowing groups to complain could reduce the cost, as the Committee might receive one collective complaint instead of many separate complaints from individuals. Another delegation argued that the inclusion of a third category of "organizations" was called for to address the systematic nature of discrimination and gender-based violence, and would be an innovative element.

33. With regard to the standing criteria of a person or group "having a sufficient interest", many delegations found this to be too vague and broad a formulation. Some delegations found such a provision to be inappropriate. One delegation offered the explanation that this would apply to a situation where the victim herself was not able to complain and a representative would do so on her behalf.

34. One delegation proposed the following categories of standing:

(a) A person acting in her own interest;

(b) An association acting in the interest of its members;

(c) A person acting on behalf of another person who is not in a position to seek relief in her own name;

(d) A person acting as a member, or in the interest, of a group or class of persons;

(e) A person acting in the public interest.

35. One delegation pointed out that the threshold test with regard to the right to complain would depend on the solution of the question of justiciability, and whether all provisions of the Convention would be covered under an optional protocol. Another delegation emphasized that the optional protocol should empower the Committee to deal with complaints regarding any of the Convention's provisions, as was done when the International Convention on the Elimination of All Forms of Racial Discrimination was adopted. It was also pointed out that a compartmentalization of the provisions of the Convention into justiciable and non-justiciable would not be desirable as it might create precedents for other human rights treaties. Some delegations emphasized that the result of the Committee's consideration of a complaint would not be a judgement, but the Committee would assess whether a State party had taken the minimum steps necessary to comply with its obligations under the Convention.

36. One delegation proposed to expand the right to file a communication to include as basis a "threat of violations", or "infringements of rights contained in the Convention".

37. While one delegation proposed to qualify the non-compliance provision by characterizing it as "deliberate, widespread, or systematic", another delegation emphasized that the purpose of the optional protocol would be to establish an individual complaints procedure.

38. One delegation raised the question as to who would bear the cost for proceedings.

Element 8

39. As to whether communications should only be in writing, delegations agreed that, in principle, the procedure should be in writing. Some proposed that in exceptional cases, when the Committee deemed that there was no other reasonable way to lodge a communication, some other means could be accepted, such as oral presentation, or taped submissions. The practical difficulties connected with oral presentations were pointed out.

40. With regard to the confidentiality of the communication, some delegations stressed the need to clarify whether this referred to the identity of the author, the confidential treatment of the communication vis-à-vis third parties, the non-disclosure of the name of the author to the State party, or the outcome of its consideration. It was suggested to clarify the policy objective of this requirement in order to arrive at a solution. The different types of confidentiality requirements contained in various elements, including in 8, 9b, 11, 12, 15 and 24, was pointed out, and the need for clarity and consistency of concepts in each case was stressed.

41. Some delegations understood the provision to mean confidential treatment of the communication, but not that the communication itself should be confidential.

Thus, knowledge of the identity of the author should be limited to the Committee and the State party. This would also be beneficial to the process of mediation. Several delegations emphasized that the State party would need to know the identity of the author in order to reply to the complaint and to initiate remedial action. Other delegations noted that if the aim of the provision was the protection of the author, this could be achieved with the provision contained in element 10, or with some other measure. The need to publicize the facts and findings upon conclusion was stressed.

42. Some delegations spoke in favour of confidentiality along the lines of existing Charter-based procedures, such as the 1503 procedure, or the communications procedure of the Commission on the Status of Women. Others argued that in light of the purpose of the protocol, the principles and practice of other human rights treaty bodies, such as the Human Rights Committee, should be used as models.

Element 9

43. With regard to the admissibility criteria proposed in element 9, one delegation noted that, while the list proposed in the element is reflective of the present stage in other comparable procedures, the preparation of a new protocol offered an opportunity for progressive development and the reflection of current practice.

44. Element 9(b): One delegation expressed support for this formulation.

45. Element 9(c): One delegation sought clarification on the conceptual distinction between "alleged violation" and "alleged failure to give effect". Another delegation noted that the formulation simply reflected a comprehensive view of the provisions of the Convention. Some delegations identified a link between these criteria and the question of standing in element 7, as well as to the question whether all provisions of the Convention would be covered by the protocol.

46. One delegation, supported by another, foresaw a potentially enormous number of communications under the second standard, and proposed the following formulation: "alleged failure to provide effective remedies to situations caused by violations of rights under the Convention".

47. Element 9(d): Several delegations noted that such a criterion is absent from other comparable procedures. They found it to be counter to existing norms and agreed that an optional protocol should apply to acts that had occurred after the entry into force of the optional protocol in the State party. One delegation expressed support for an approach whereby the admissibility criterion would be the entry into force of the Convention, not of the optional protocol, in the State party.

48. Element 9(f): With regard to the element on the exhaustion of domestic remedies, one delegation expressed its preference for the formulation contained in the First Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR). Others stated their preference for language as contained in the Convention against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which stated that the requirement of the exhaustion of domestic remedies should not be the rule where domestic remedies were unreasonably prolonged, or unlikely to bring effective relief. The language contained in the latter would also be in accordance with the practice of the Human Rights Committee, which interpreted its own provision to include the absence of effective domestic remedies, their lack of effectiveness, or denial of a remedy. Another delegation suggested that more general wording might be needed which would include that the victim was unaware of domestic remedies, or of their availability. It was also suggested to include the word "available" before "domestic remedies", as that would be in line with other instruments. One delegation pointed out that it would not be in line with the role of the Committee to judge whether domestic remedies had been exhausted.

49. With regard to the second sentence, and especially the proposed power of the Committee to declare another international procedure "unreasonably prolonged", many delegations agreed that such a provision would be inappropriate as it would give the Committee the power to judge the work of other bodies. Instead, preference for existing language was expressed, such as in the Convention against Torture or in the Migrant Workers Convention, i.e. that the same matter "has not been, and is not being, examined by another treaty body." Reference was also made to article 27.1.b of the European Convention establishing inadmissibility when a petition "is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information".

50. One delegation, supported by several others, proposed the addition of two criteria, namely that a communication would be inadmissible when manifestly ill-founded; and the inclusion of a time-limit, i.e. that a communication be inadmissible if deposited after 12 months since the date of the decision of the highest domestic instance, or a similar reasonable length.

51. One delegation proposed the addition of the following criteria: "Communications should be in compliance with the principles of objectivity and justice and should include legal remedies or reparations, if any, undertaken by the State party concerned."

52. Element 9(g): One delegation raised the question as to who would determine, and what would be considered, a "reasonable period". It was suggested that the Committee might have this responsibility.

Element 10

53. Several delegations, pointing to the innovative character of this element on interim measures, expressed their support for its explicit inclusion in the optional protocol. They noted that that would be in line with existing practice of international, as well as regional, human rights bodies. In order to avoid irreparable harm, the Committee should be empowered to take urgent action when necessary. Noting the positive intention of the provision, other delegations suggested that it should be left to the Committee to include such a provision in

its rules of procedure. Such a placement would allow the Committee more flexibility in its practical application.

54. A number of delegations, pointing to the language used in the element, considered it inappropriate to confer upon the Committee power to "request" a State party to take such measures. Instead, the Committee should be able to "recommend" interim measures. Their application should be left to the discretion of the State party. The need for a separate undertaking on the part of the State party was doubted, as States parties were already expected to act bona fide upon ratification of the instrument.

55. Several delegations noted a lack of clarity and precision in the use of the term "preservation of the status quo", suggesting that the intention for recommending such interim measures needed to be further specified. They agreed that it could not mean that an alleged violation be preserved, but rather its termination and avoidance of irreparable harm, or the prevention of a violation. One delegation proposed to reword the element to give the Committee the right to recommend, or suggest, interim measures so as not to inflame further the situation. One delegation proposed to distinguish between interim measures at the admissibility stage, and during the proceedings on the merits of a communication, in accordance with the practice of the Convention against Torture.

56. One delegation suggested that there might be a need to monitor the application of such interim measures at the national level.

57. One delegation emphasized the requirement, contained in the element, that no inference could be drawn from the recommendation of interim measures for the Committee's decision on the merits.

Notes

1/ See Official Records of the General Assembly, Fiftieth Session, Supplement No. 36 (A/50/36), chap. I.B.